

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

SENSITECH INC. and DONALD W.
BERRIAN,

Plaintiffs,

vs.

TIME & TEMPERATURE COMPANY
d/b/a TIME 'N TEMPERATURE
CORPORATION

Defendant.

Case No. 04-11483MLW

**DECLARATION OF DAVID VAUGHT
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE**

DECLARATION OF DAVID VAUGHT

I, David Vaught, declare:

1. I am over the age of eighteen (18). I make this declaration of my own personal knowledge or on information and belief where so stated. If called as a witness, I could and would competently testify to the truth of the matters asserted herein.

2. I submit this declaration in support of Sensitech's Opposition to Defendant's Motion to Dismiss, or, in the Alternative, to Transfer Venue.

3. I am employed by Sensitech as its Sales Manager for, Supermarkets. I have held this position since August 22, 2000. Before that, I was employed by Ryan Instruments, another manufacturer of temperature monitor devices, as its Sales Manager.

4. As Sales Manager for Supermarkets, I am responsible for sales management of Sensitech's temperature monitoring products in the domestic and Canadian food industry.

5. Upon information and belief, TnT has made direct arrangements with receivers of perishable goods whereby the receivers require or request that grower/shippers use TnT's monitors on shipments to that receiver. TnT has entered a number of such programs with receivers across the country, including accounts in Massachusetts, as reflected on the attached list of SmartChek users TnT faxed to perishable goods suppliers on March 22, 2002. (Ex. A.) This list was located in my files at Sensitech. Upon information and belief Sensitech originally obtained this document some time ago when one of its field sales representatives obtained it from a produce supplier.

6. Upon information and belief, TnT sent "blast" faxes of this type to grower/shippers periodically to remind them to use SmartChek recorders on shipments headed for the receivers who made the affirmative decision to standardize their temperature monitoring programs on TnT products and services. This is reflected in the statement on the top of the list reading "Check this list for your customer's who request SmartChek digital recorders. Call 800-338-7295 to order." (Id.)

7. Also located in my files is an April 4, 2002 letter from TnT's Sales Manager Phil Tripoli to a receiver of perishable goods. (Ex. B.) This letter describes TnT's "SmartChek program" and identifies C&S Wholesale and Shaw's as among TnT's accounts.

8. Shaw's is a Supermarket chain based in Massachusetts.

9. Based on my own experience in making a sales call on C&S Wholesale for the purpose of proposing a program similar to the one established by TnT with that company I can confirm that the personnel at C&S Wholesale authorized to select a temperature monitoring vendor are located at the company's Hatfield, Massachusetts offices. (Ex. B, 1-2)

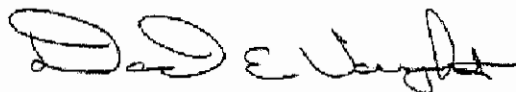
10. Note that the copy of this letter was forwarded to Sensitech's Calgary, Canada sales office from the recipient with all references to its name redacted, apparently because this contained information regarding a competitor of Sensitech. Sensitech does not have an unredacted copy of this letter.

11. In addition, in my files I located correspondence from TnT to a potential new receiver customer concerning a temperature monitoring program based on TnT's SmartChek product. (Ex. C). This correspondence included a written document entitled "SmartChek proposal" that outlined the terms of TnT's program and had spaces to be signed by TnT and the receiver. Based on information and belief I can confirm that the proposed terms of the potential business agreement with this receiver are generally consistent with the terms of similar business agreements offered to, and accepted by, other receivers throughout the U.S., including receivers in Massachusetts. (Ex. C, last page.)

12. I am based in Sensitech's Redmond, Washington location, which consists mainly of a manufacturing facility where mechanical stripchart monitors are made. I routinely travel to Massachusetts in connection with my job.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 20, 2004
Redmond, Washington

A handwritten signature in black ink, appearing to read "David Vaught", written over a horizontal line.

David Vaught

EXHIBIT A

TNT SMARTCHEK;

0050500810 ;

MAR 22-02 11:59AM;

PAGE 1/1

Check this list for your
customer's who request
SmartChek digital recorders.

Call 800-338-7295 to order

A & P- ALL Divisions

✓ A & J - Bronx, NY

Alphas Chelsea, MA

✓ Alphas-New York

✓ Al Finer

Bebo Distributing

Big Bear-Ohio

Big Y Foods-MA.

Bozzuto's- MA.

Brookshire Foods-Tyler TX

C & S Wholesale-MA

Community Suffolk, MA

✓ Caito Foods Service-IN

✓ Caribbean Produce

✓ Consumer's Produce-PA

Cooseman's Worldwide

East Coast Fruit-FLA

Economy Produce

Edward G. Rahll & Sons

First Produce

First Quality Produce

Fleming Co. All Divisions

Food Lion

G & G Produce

Gallo Produce

Giant Eagle

✓ H. Brooks, Minn.

✓ Hunter Bros.

I.O. Simms/Great Britain

Jos. Notarianni-PA

Klayman produce

Klinghoffer Brothers

✓ M. Levin & Co.

Manson Produce-Canada

Mid-Mountain Foods

✓ Nardella, Inc.

✓ O.K. Grocery

✓ Pinto Bros., Inc.

Price Chopper/Golub

✓ Procacci Brothers

Produce Alliance

Pueblo

Riser Food Company

Riverside Markets

✓ RLB Distr.

Roundys-Milwaukee

Shaw's Supermarkets

✓ Tavilla Sales

Tom Lange Company

✓ Tony Vitano Co.

TOPCO-All associates

Tops Markets

Tronbetta

✓ United Fruit -St. Louis

Verdelli Farms-PA

Wakefern

Weiss Markets

✓ Wm. Rosenstein

✓ Wm. Rothel, Inc.

SmartChek is the preferred
provider for NAPAR/FMI
Members.

Ron,
Please check with
customers because we
now on list is correct.

EXHIBIT B

04/05/2002 16:51 4032435307

MINNAAR CANADA

PAGE 01

Apr-08-2002 03:57pm From-

T-843 P 001/002 F-102

SmartChek

Digital Recorders

by



Time 'N Temperature Corporation

ATT: DAVID425-883-3766April 4th 2002

It was a pleasure to talk to you today and I am pleased to offer our *SmartChek* program for your consideration. As we discussed, we have an excellent digital recorder and a generous rebate program that will build a large profit center based on your estimate of 50 recorders per week.

We encourage you to compare the recorder you now receive and what is available on the LCD with the *SmartChek* recorder. We have designed the *SmartChek* to offer a great deal of useable, accurate information instantly at the receiving dock saving valuable time for inspectors & QC personnel.

Why SmartChek?

1. Large LCD provides the length of trip in days and hours
2. Instantly see the high/low temperature & full trip average temperature.
3. With the press of a button you can see each days high/low and average temperature. ← HIGH
4. *SmartChek* is designed to record even if it is not started-SAFEGUARD!
5. *SmartChek* is closed & sealed to protect and prevent tampering. ✓
6. No icons/symbols and numbers without detail-with *SmartChek* you know ←
what you are looking at and what it means.

I am sending a sample recorder with data already recorded so you can see the end result. Just remove the sleeve and open the unit. Also included are the printouts available from the *SmartChek* in chart form and a tabular listing of each temperature recorded.

I understand you do not have computers available for downloading the recorders. We can provide [REDACTED] with 2 computers, monitors and printers with this program. The advantage is that you receive a chart on one piece of paper, not a

04/05/2002 16:51 4032435307

MINNAAR CANADA

PAGE 82

Apr-05-2002 03:57pm From-

T-543 P.002/002 F-182

strip chart. The data is automatically saved so it is a one step process AND the computers are available for other uses.

Our proposal for [REDACTED]

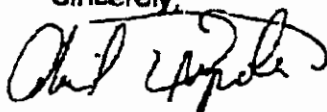
- **SmartChart** T N T provides 2 new PCs with monitors & printers for [REDACTED]
[REDACTED] US\$ ← unit 435
- Monthly rebate is \$12.00 per returned unit.
- **Smartchart** Software and cables are also provided.
- Prepaid return cartons are provided on a regular basis.

At the end of 12 months, if 5,000 or more **SmartChart** recorders have been returned an extra cash bonus of \$ 2,500 will be paid.
This offer is good until April 30th.

Rebates are paid on time each month with a comprehensive report. We provide return pre-paid return boxes for your convenience.

Smartchart recorders are the preferred provider by NAPAR and FMI plus other participants in the program include A & P, Fleming Companies, Roundy's, C & S Wholesale, Shaw's, Price Chopper, Tom Lunge, Food Lion and many more. We can provide references and contacts. We have 30 years experience in time & temperature recording for the produce industry. It would be a pleasure to serve [REDACTED] and I will call you after you have received this package to answer any questions you may have. This is a good program, a solid product and a great opportunity for [REDACTED].

Sincerely,



Phil Tripoli
Sales Manager
Time-N-Temperature, Inc.

EXHIBIT C

SmartChek

Digital Recorders

by



Time 'N Temperature Corporation

10/2/01

Dave,

This is the information I promised you concerning the Smart Chek Temperature Recording device. I can assure you of quality and service with this product and our company. The pricing is as follows:

- 23.50 per unit
- Rebates for Chiquita are as follows:
 - A) 300 units per month, \$9.00 per unit
 - B) 300 to 599 units per month, \$10.00 per unit
 - C) 600+ units per month, \$11.00 per unit
- Rebates to be paid monthly on time on returned units
- Price includes cables and software to download information from the device.
- Return boxes will be furnished on a regular basis.
- Information received from returned units will be stored for a period of two years

I am looking forward to meet with you in the near future to review this program. If you have any questions, please do not hesitate to call me at 919-678-8118 or on my cell at 513-470-7968. There is voice mail at either number.

Sincerely,

A handwritten signature in dark ink, appearing to read "Phil Tripoli", with a stylized, flowing script.

Phil Tripoli
Time-N-Temperature, Inc.

Why are so many buyer's insisting on **SmartChek** Digital recorders???

SmartChek features make it the best & most reliable temperature recorder available!

- ✓ Large LCD: Easy to read & understandable display shows trip time & temperature information with the push of a button. **SmartChek ELITE** shows the high/low temperatures plus the average recording daily temperature. DAY by DAY temperature information at the tip of your fingers, INSTANTLY!
- ✓ Safety: **SmartChek** is always recording, even if the shipper forgets to start it. Data is recorded & available.*
- ✓ Download: Easy-fast download with full chart or tabular listing of each temperature reading. **SmartChek** uses standard cable & free software. There is NO SPECIAL READER required.
- ✓ Rebate: We have an aggressive rebate program including easy prepaid mailers, cut costs!
- ✓ Accurate to within 1/2 ° F.
- ✓ Easiest digital to use. No ALARM, all information is available on the LCD. Don't depend on factory or shipper to set alarms.

*memory chip

SmartChek is available from over 250 produce shippers! Join the growing number of receivers who are taking control of their recorder programs for quality, reliability and cost saving!

Call for all the information! You'll be glad you did!

SmartChek Digital recorders
Time 'N Temperature
Ventura, CA
800-338-7295 Fax 805-650-0610
www.smartchek.com

WHY IS *SmartChek* THE SMART CHOICE ???

We love comparisons • There is a BIG difference!

Feature

SmartChek Elite Other Digital

| | | |
|---|----------|-----|
| Large LCD with <u>elapsed time</u> . | YES | ??? |
| Real temperatures and average temperature information PLUS highs/lows and daily averages-DAY BY DAY. | YES | ??? |
| Easy to understand information on the LCD. | YES | ??? |
| Always recording, even if not started or prematurely stopped due to error or tampering.* | YES | ??? |
| Alarm, must be preset by Mfg. or shipping Company. | NO VALUE | ??? |
| ALL information available whether alarm set or not. | YES | ??? |
| USER Friendly Software at no cost, easy Internet access. | YES | ??? |
| No special interface or reader required, uses standard cable. | YES | ??? |
| Convenient size, won't be easily lost in the load. | YES | ??? |
| Generous Rebate and prepaid mailers provided for returns. <u>Not a Throwaway</u> . Data saved for 2 years by SmartChek . | YES | ??? |

*memory capacity

SmartChek Digital recorders by Time 'N Temperature

800-338-7295 Fax 805-650-0610

www.smartchek.com

SmartChek

Digital Recorders



by Time 'N Temperature Corporation

SmartChek Security Features

The following pages illustrate
the exclusive & beneficial features
designed into *SmartChek* Recorders.

These features put *SmartChek* in a class of it's own, providing the
most dependable in-transit monitoring available.

- ✓ *SmartChek* is designed to record even if it is not started.
- ✓ *SmartChek* software can provide data even if the recorder is
accidentally started prematurely in error.
- ✓ *SmartChek* can provide data even if it is turned off prematurely or
there has been tampering.
- ✓ *SmartChek* is SEALED- No Exposed buttons to allow for
unauthorized personnel to stop unit prior to arrival!

The bottom line:

Smartchek is designed to provide data when other
Recorders would be useless!

SmartChek is the SMART CHOICE

Serial Number: 19549

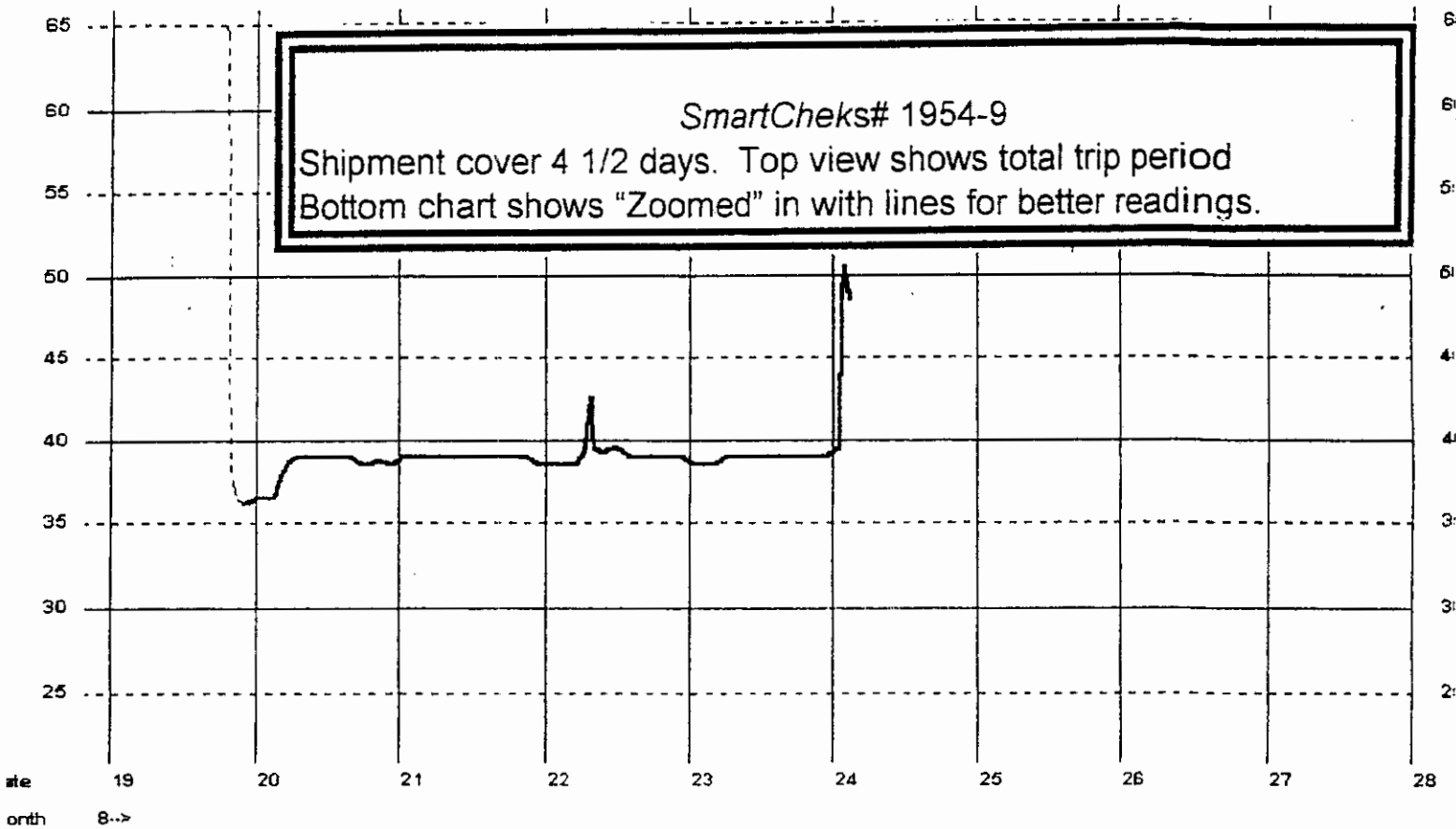
Start Date: 08/19/98 19:57

Highest Temp: 51

End Date: 08/24/98 03:53

Lowest Temp: 36

Temperature - Fahrenheit



Left:

SMART CHEK TEMPERATURE PLOT

Serial Number: 19549

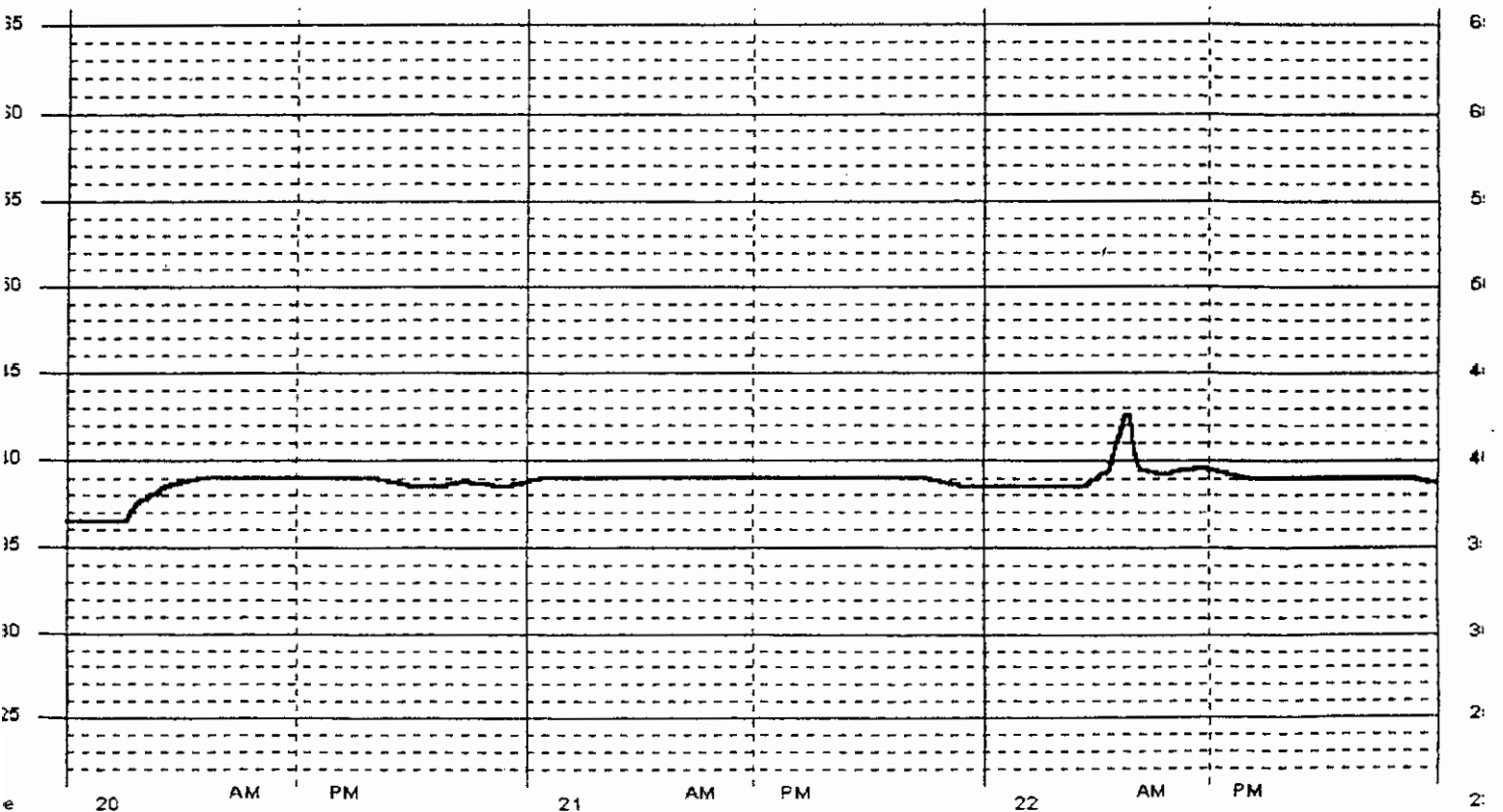
Start Date: 08/19/98 19:57

Highest Temp: 51

Temperature - Fahrenheit

End Date: 08/24/98 03:53

Lowest Temp: 36



Ref: TNT SMART CHEK TEMPERATURE PLOT

Serial Number: 18894

Start Date: 07/08/98 00:00

Highest Temp: 78

End Date: 07/18/98 22:45

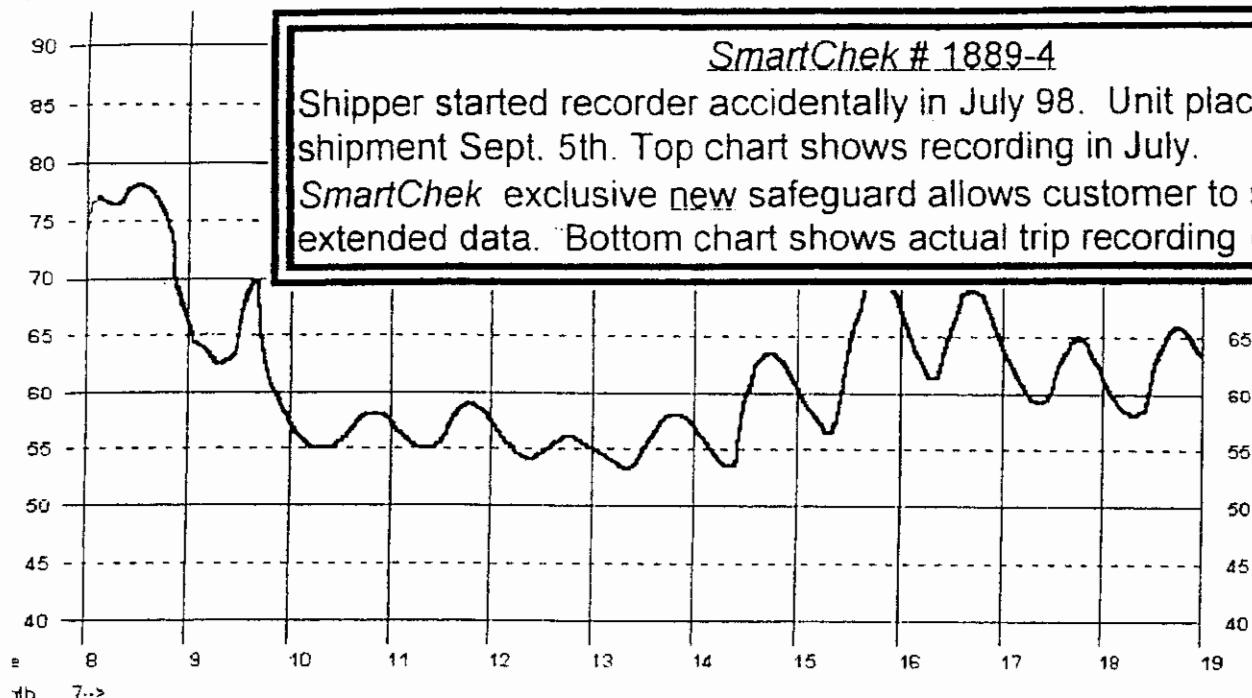
Lowest Temp: 53

Temperature - Fahrenheit

SmartChek # 1889-4

Shipper started recorder accidentally in July 98. Unit placed on shipment Sept. 5th. Top chart shows recording in July.

SmartChek exclusive new safeguard allows customer to see extended data. Bottom chart shows actual trip recording circled.



Customer ID: TimeTemp#1

Ref: 67223

SMART CHEK TEMPERATURE PLOT

Serial Number: 18894

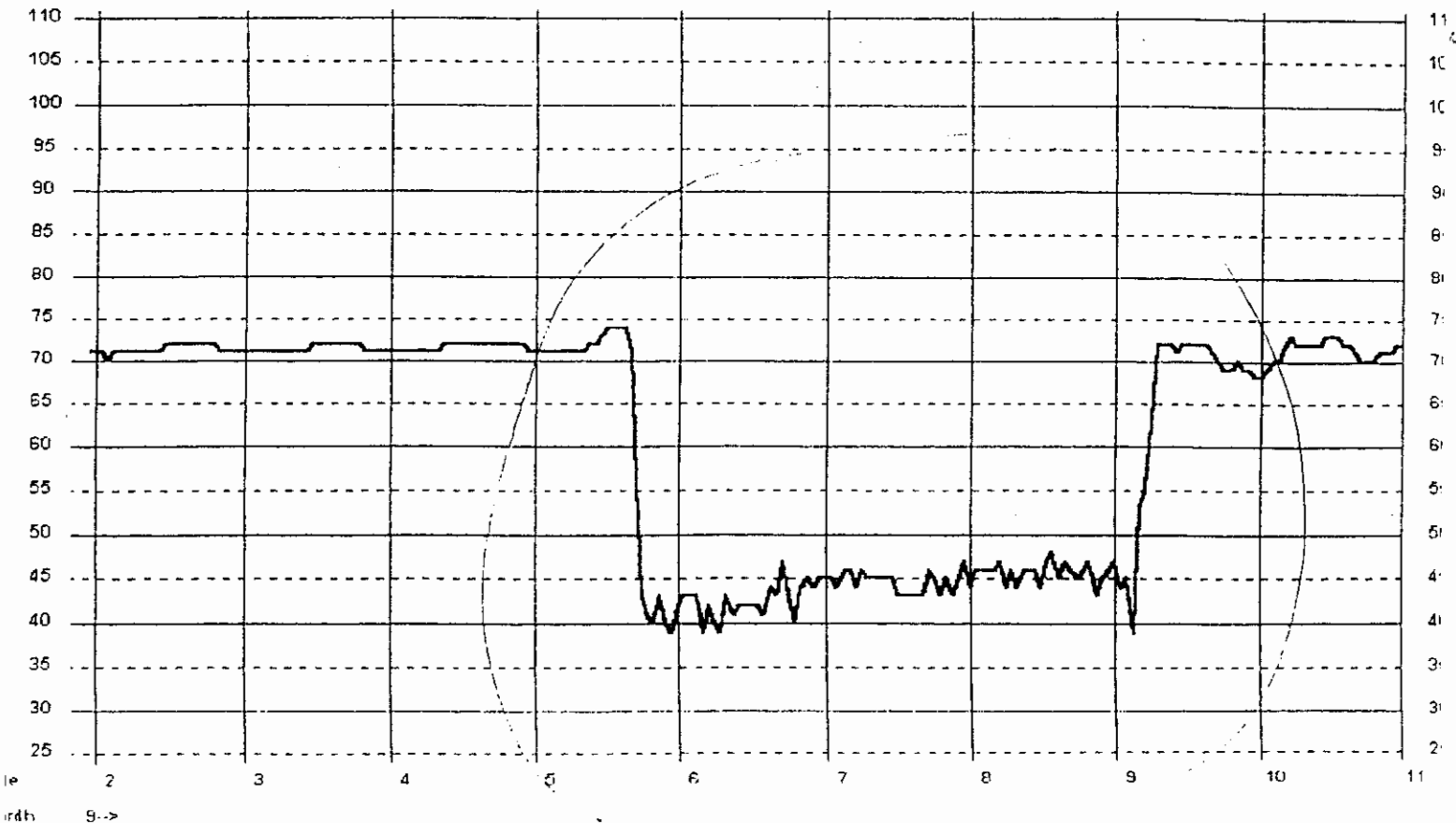
Start Date: 07/18/98 22:45

Highest Temp: 96

End Date: 09/24/98 11:23

Lowest Temp: 39

Temperature - Fahrenheit



Customer ID: Time&Temperature

Ref:

Serial Number: 19570

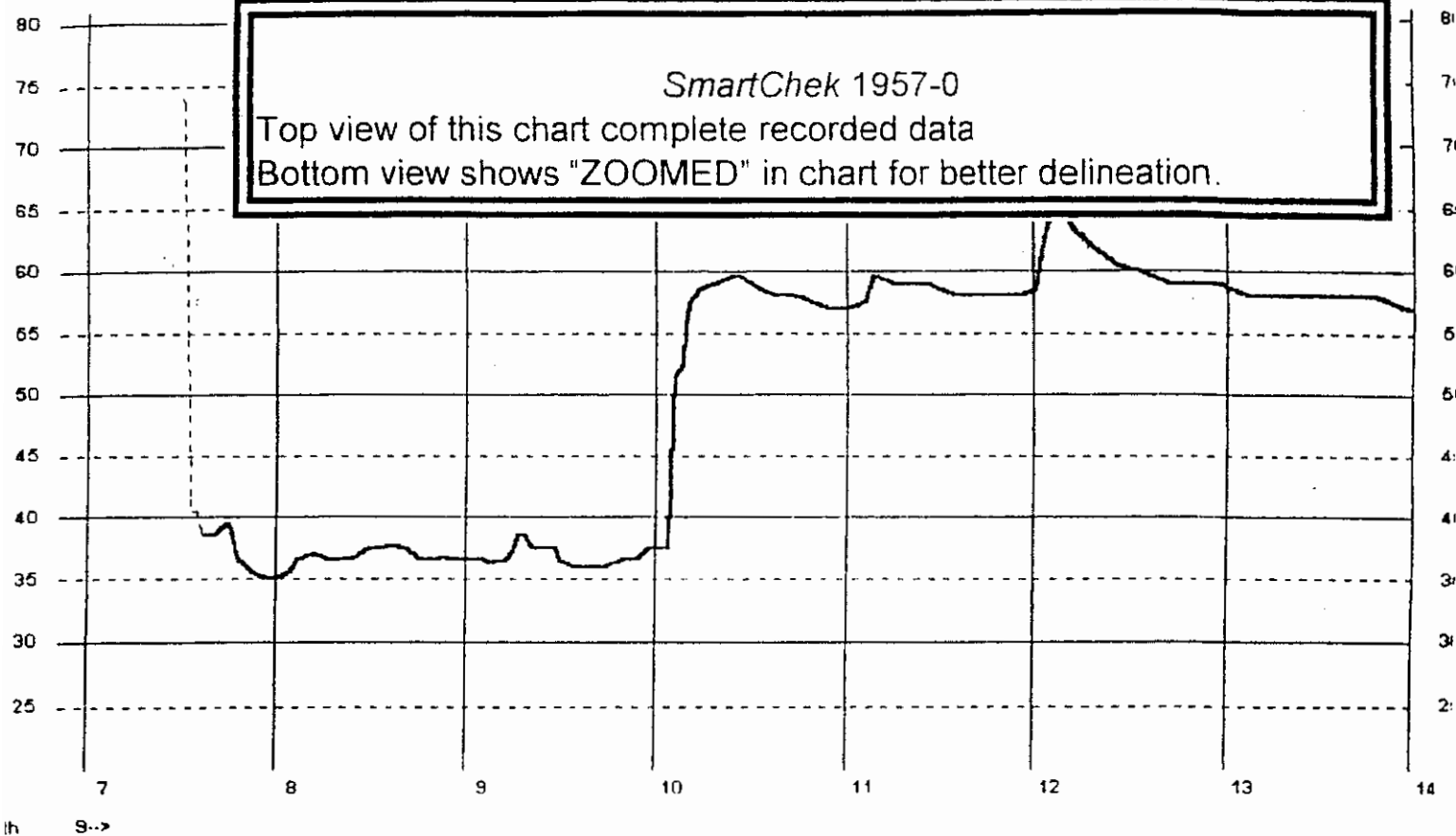
Start Date: 09/07/98 12:34

Highest Temp: 66

End Date: 09/10/98 10:45

Lowest Temp: 35

Temperature - Fahrenheit



Ref:

Serial Number: 19570

SMART CHEK TEMPERATURE PLOT

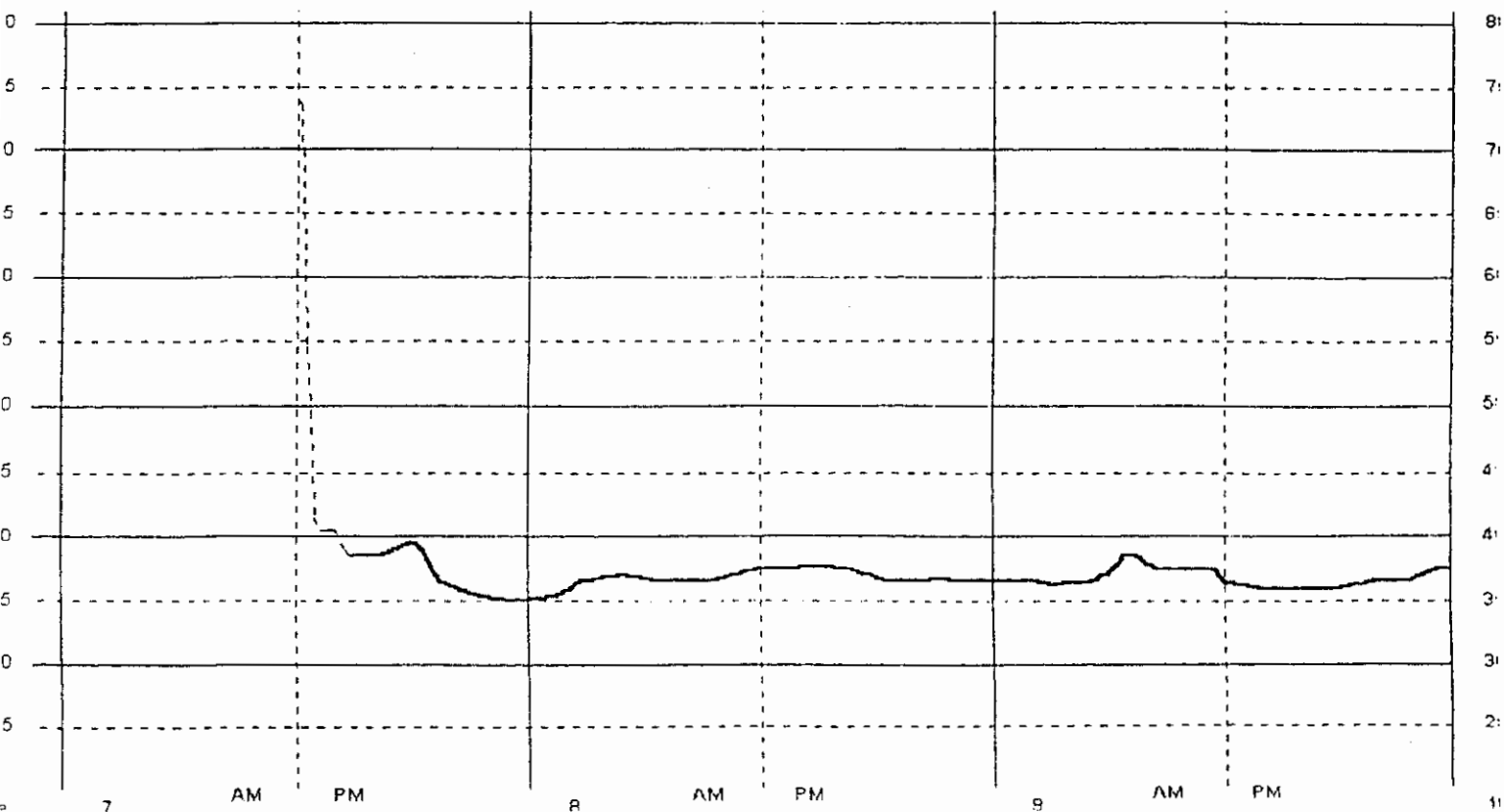
Start Date: 09/07/98 12:34

Highest Temp: 66

End Date: 09/10/98 10:45

Lowest Temp: 35

Temperature - Fahrenheit



Serial Number: 19191

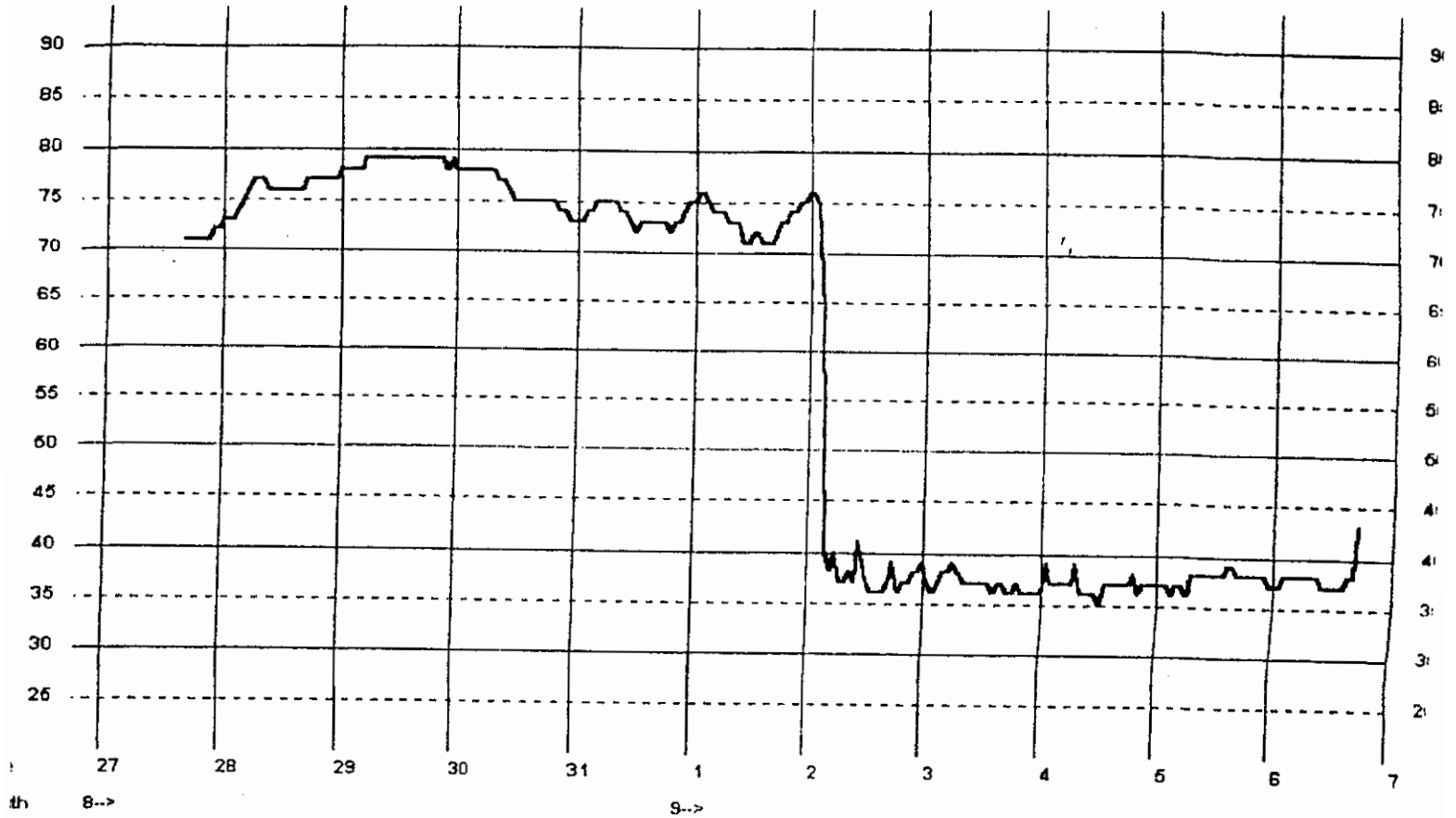
Start Date: 08/27/98 17:00

Highest Temp: 79

End Date: 09/06/98 17:00

Lowest Temp: 35

Temperature - Fahrenheit



Customer ID:

SmartChek# 1919-1

Recorder never started by shipper. Arrived Sept. 6th. Software allows for full recorder reading-Trip data is saved!

Serial Number: 19549

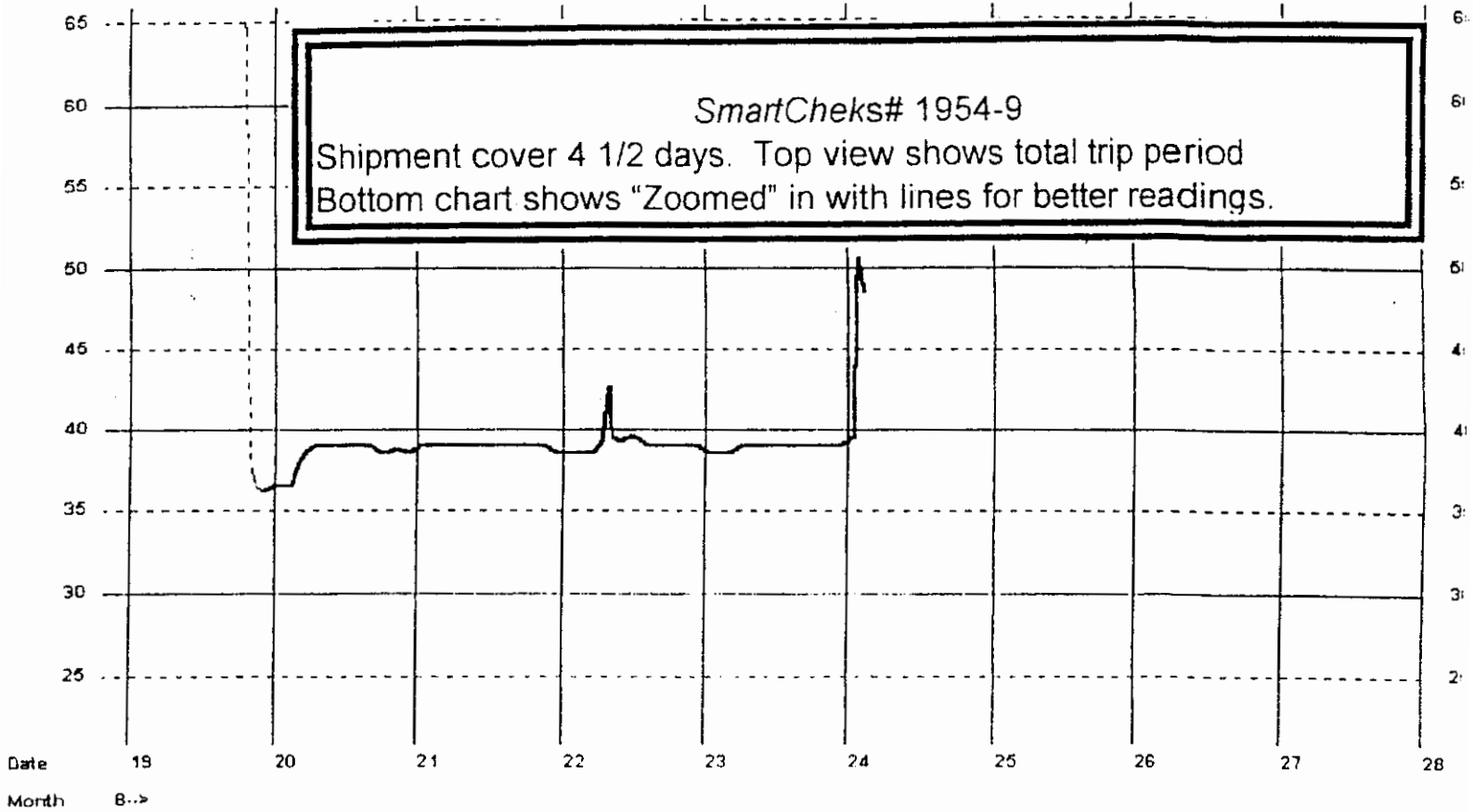
Start Date: 08/19/98 19:57

Highest Temp: 51

End Date: 08/24/98 03:53

Lowest Temp: 36

Temperature - Fahrenheit



Ref:

SMART CHEK TEMPERATURE PLOT

Serial Number: 19549

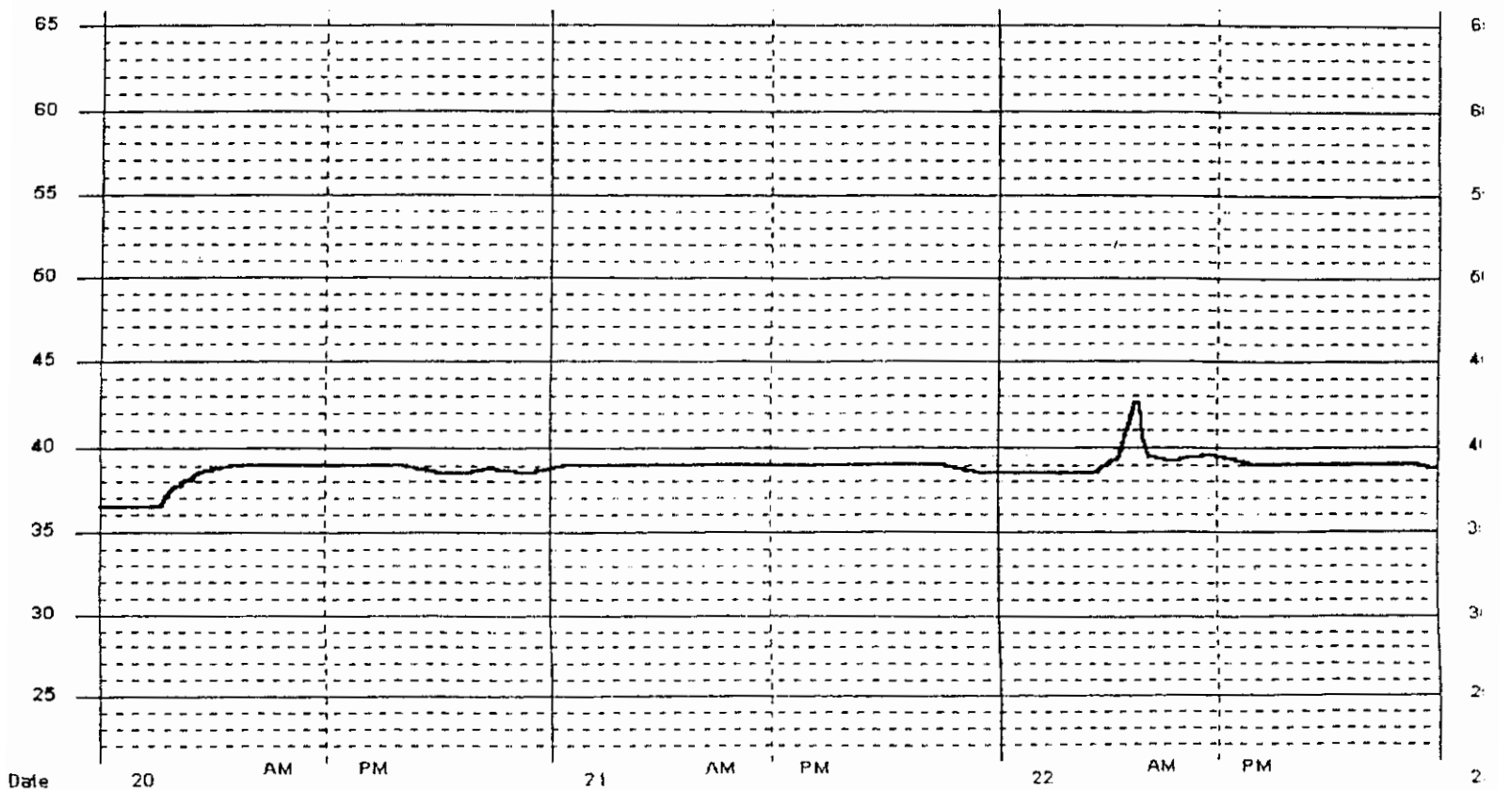
Start Date: 08/19/98 19:57

Highest Temp: 51

End Date: 08/24/98 03:53

Lowest Temp: 36

Temperature - Fahrenheit



SmartChek Proposal

You have selected the *SmartChek* Digital recorder for quality, value & reliability. To fully implement this cost saving program, and insure that you receive all the funds available to you, we have agreed to the following procedures.

1. A letter will be sent to all produce suppliers, advising them *SmartChek* recorders are the only in-transit temperature recorder to be used on shipments. The letter should be directed to the sales manager, or the salesman that handles your account. A copy of the letter will be sent to Time 'N Temperature Corporation. If desired, Time 'N Temperature Corporation would be pleased to do the mailing for you.
2. An internal letter, or memo will be sent to all that order produce, advising them of the program, and instructing them to request a *SmartChek* recorder anytime a recorder is required for a shipment. Instructions given to receiving personnel to list on manifest the name of recorder received, and advise the buyers if it is not *SmartChek*. Time 'N Temperature will need a list of buyers so we can update them on activity and new information.
3. It is agreed that Time 'N Temperature Corporation may communicate with produce suppliers, advising them of desire to use *SmartChek* recorders, and will identify the top 20 suppliers for this purpose. With the *SmartChek* service coordinator also contacting the suppliers, this will enhance, and ensure their full compliance with your request for maximum cooperation.
4. Time 'N Temperature Corporation will provide suppliers with *SmartChek* recorders at a cost of \$23.50 per recorder.
5. Time 'N Temperature Corporation will supply, at no charge, software, cable for downloading of *SmartChek* recorders, and prepaid mailing cartons for return of *SmartChek* recorders.
6. Time 'N Temperature Corporation will account for returned recorders after the close of each month, issue a report, and a rebate check equivalent to \$10.00 for each returned *SmartChek* recorder, as long as this agreement is complied with.
7. It is understood this program does not have to be limited to produce, and floral suppliers, and can include any perishable commodity. Once all of the above are accomplished this program is in effect, and your company will start to realize a major reduction in recorder costs.

Agreed to:

Agreed to:

Time 'N Temperature Corp.

Company

Date

Date